Supreme Court, U.S.
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No. 95-1945

In the Supreme Court of the United States

OCTOBER TERM, 1995

CORRECTED COPY

ROBERT GREENSPAN, D.D.S., P.C., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that petitioner's dentists are not "supervisors" within the meaning of Section 2(11) of the National Labor Relations Act.

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OPINIONS BELOW

The summary order of the court of appeals (Pet. App. A1-A3) is not yet reported. The decision and order of the National Labor Relations Board (Pet. App. A4-A6), and the decision of the administrative law judge (Pet. App. A7-A34), are reported at 318 N.L.R.B. No. 5.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 1996. A petition for rehearing was denied on May 24, 1996. The petition for a writ of certiorari was filed on May 31, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a dental clinic in New York City, employs (among other individuals) ten dentists and fifteen dental assistants. Pet. App. A9. Petitioner's dentists and dental assistants practice "four handed sit-down dentistry": the dentists perform general dentistry, including extractions, root canals, and filling cavities; the dental assistants, functioning as the dentists' "second set of hands," perform such tasks as retracting tissue, mixing materials, and aspirating fluids. *Id.* at A9-A10.

Before August 1994, petitioner had maintained a longstanding bargaining relationship with the Doctors Council (the Union), which it recognized as the exclusive collective-bargaining representative for its dentists. Pet. App. A8-A9. Petitioner's most recent labor agreement with the Union expired on December 31, 1993. On August 22, 1994, petitioner broke off negotiations for a new contract. Petitioner informed the Union that, in its opinion, the dentists were "supervisors" within the meaning of Section 2(11) of the National Labor Relations Act (Act), 29 U.S.C. 152(11),[1] and, accordingly, that it was under no legal

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[1] Section 2(3) of the Act, 29 U.S.C. 152(3), excludes from the definition of "employee," and thus from the coverage of the Act, "any individual employed as a supervisor." Section 2(11) of the Act, 29 U.S.C. 152(11), defines "supervisor" to mean:

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is

obligation to bargain with the Union regarding the dentists' terms and conditions of employment. Pet. App. A8. Subsequently, petitioner negotiated directly with the dentists and unilaterally granted them a wage increase. *Id.* at A8-A9.

2. On March 31, 1995, the General Counsel of the National Labor Relations Board (Board) filed a complaint against petitioner, alleging, among other things, that petitioner had violated Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5), in refusing to bargain with the Union. Pet. App. A7, A21.[2] Petitioner defended its refusal to bargain on the ground that the dentists were statutory supervisors under Section 2(11). Pet. App. A21-A22.

On July 31, 1995, adopting the decision of an administrative law judge (see Pet. App. A7-A34), the Board held that "the bargaining unit dentists employed by [petitioner] are not supervisors within the meaning of Section 2(11) of the Act." *Id.* at A4-A5. It rejected petitioner's contention that the dentists were supervisors because they had the authority "effectively to recommend" the "transfer" of dental assistants. *Id.* at A5. The Board observed that "the dentists' authority to recommend that a dental assistant be transferred is a means of ensuring compatibility among employees who work closely together rather than an indication of supervisory status under

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not of a merely routine or clerical nature, but requires the use of independent judgment.

[2] Acting pursuant to Section 10(j) of the Act, 29 U.S.C. 160(j), the General Counsel also sought and obtained interim injunctive relief against petitioner in federal district court. The court's injunction, among other things, required petitioner to bargain with the Union pending the Board's resolution of the unfair labor practice complaint. Pet. App. A7-A8.

Section 2(11) of the Act." *Ibid.* The Board observed that, if an unsatisfactory working relationship developed between a dentist and a dental assistant, both employees "essentially have reciprocal rights to request transfers," and either was free "to ask for, or demand, a reassignment." *Ibid.* The Board further noted that petitioner had granted dental assistants' requests for such a transfer on at least two occasions. *Ibid.*

The Board also adopted an alternative ground for its determination that the dentists were not statutory supervisors. Pet. App. A5. The Board found that, even if (as petitioner urged) the dentists had authority "effectively to recommend" transfers of dental assistants with whom they worked, the dentists did so "too infrequently to establish supervisory status" for purposes of Section 2(11). Pet. App. A5. The Board pointed out that the evidentiary record contained only four instances in which a dentist had actually recommended that a dental assistant be transferred to another dentist; and two of those instances, the Board added, were "of limited probative value" because they occurred after petitioner had already withdrawn recognition from the Union. *Ibid.*

To remedy petitioner's unfair labor practice, the Board, among other things, ordered it to bargain, upon request, with the Union with respect to the dentists' terms and conditions of employment. Pet. App. A6, A32.

3. The court of appeals enforced the Board's order in an unpublished summary order (Pet. App. A1-A3), "substantially for the reasons stated in the decision and order of the Board." Pet. App. A3.

ARGUMENT

1. Petitioner does not challenge the Board's principal holding (Pet. App. A5) that the dentists' transfer rights are similar to the dental assistants' transfer rights and are therefore insufficient to confer "supervisory" status for purposes of Section 2(11). Rather, petitioner's sole contention (Pet. 3-4) is that the Board's *alternative* holding—that, regardless of the transfer rights of the assistants, the dentists exercised their own transfer authority "too infrequently to establish [statutory] supervisory status" (Pet. App. A5)—is erroneous. That is so, according to petitioner (Pet. 4), because "the plain reading of § 2(11) * * * deems anyone who possesses any of the indicia set forth in § 2(11) of the Act a supervisor, regardless of the frequency that their authority is exercised."

Even if petitioner's argument on this point were valid (which, as discussed below, it is not), this case would be an inappropriate vehicle for addressing it. Because petitioner has not challenged the Board's principal holding regarding the reciprocal transfer rights of dentists and dental assistants,[3] resolution of petitioner's challenge to the Board's alternative holding would not affect the outcome of this case.

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[3] That holding is consistent with the settled rule that a skilled employee's "power, indirectly, to bring about the transfer * * * of a helper whose work the [skilled employee] is not satisfied with" does not constitute an "effective recommendation" of transfer for purposes of Section 2(11). See *Ward-McCarty Hot Oil-Paraffin Service*, 171 N.L.R.B. 731, 733-734 (1968); accord *Southern Bleachery & Print Works, Inc.*, 115 N.L.R.B. 787, 791-792 (1956), enforced, 257 F.2d 235 (4th Cir. 1958), cert. denied, 359 U.S. 911 (1959); *Soil Engineering & Exploration Co.*, 269 N.L.R.B. 55, 55-56 (1984).

2. In any event, petitioner does not even allege that the court of appeals' summary order—to the extent that it may be construed to have sustained the Board's alternative holding—is in conflict with any decision of this Court or of another court of appeals. Cf. Sup. Ct. R. 10(a) and (c).[4] Rather, petitioner simply contends (Pet. 4), that "Congress has determined that the presence of any one of the twelve indicia of supervisory authority, which are expressly set forth in [Section] 2(11) of the Act, renders one a supervisor who is not entitled to the Act's protections," and that the court of appeals has "rewritten" Section 2(11) by "add[ing] an additional requirement—the frequency with which that authority is exercised—to the otherwise clear definition fixed by Congress."

As the Board recognized, however, "it is not the exercise of authority, but the delegation of authority which is indicative of the attributes of a supervisor." Pet. App. A25 (internal quotation marks omitted); see *id.* at A4 (adopting ALJ opinion). Thus, where an employer specifically delegates supervisory functions to individuals, those individuals are statutory supervisors, even if in practice they rarely exercise their authority. See, *e.g.*, *American Diversified Foods*,

114 S.Ct. 1778

[4] In *NLRB* v. *Health Care & Retirement Corp.*, ~~511 U.S. 571~~ (1994), this Court invalidated the Board's rule that "a nurse's supervisory activity is not exercised in the interest of the employer if it is incidental to the treatment of patients." *Id.* at 1782-1783. The Court made clear, however, that its holding "casts no doubt on Board or court decisions interpreting parts of [Section] 2(11) other than the specific phrase 'in the interest of the employer.'" *Id.* at 1785. The present case involves the Board's construction of Section 2(11)'s phrase "effectively to recommend," not the phrase "in the interest of the employer."

Inc. v. *NLRB*, 640 F.2d 893 (7th Cir. 1981). But the occasional exercise of *de facto* supervisory authority does not itself confer statutory "supervisory" status. "A supervisor may be vested with plenary power and rarely exercise it, but one who engages in an isolated incident of supervision is not necessarily a supervisor under the Act." *NLRB* v. *Security Guard Service, Inc.*, 384 F.2d 143, 149 (5th Cir. 1967); see also *Highland Superstores, Inc.* v. *NLRB*, 927 F.2d 918, 922 (6th Cir. 1991); *NLRB* v. *Res-Care, Inc.*, 705 F.2d 1461, 1467-1468 (7th Cir. 1983); *NLRB* v. *Orr Iron, Inc.*, 508 F.2d 1305 (7th Cir. 1975).

Here, petitioner had *not* delegated to the dentists the authority to make effective recommendations regarding the transfer of dental assistants. Pet. App. A25 ("the dentists were never specifically notified, orally or in writing, that they had such authority"). Rather, the dentists are professional employees, whose job function is limited to "perform[ing] dental work on [petitioner's] patients for about 7 hours a day." *Id.* at A26. To the extent that, in the course of performing root canals, filling cavities, and the like, they recommend the transfer of dental assistants with whom they work, those recommendations are "extraordinary exceptions to their dental practice." *Ibid.* (internal quotation marks omitted); see also *id.* at A5. Thus, even if it were assumed that the court of appeals' decision necessarily rested on this alternative holding regarding the frequency of the dentists' transfer recommendations—which it does not—that decision still would raise no issue warranting further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

REPLY BRIEF FOR PETITIONER

The National Labor Relations Board ("the Board") asks this Court to avoid review of its flaunting a long-standing and important labor policy set forth by Congress in the National Labor Relations Act ("the Act"). Congress has determined, in the Act, that in order to preserve industrial stability, employers are not required to bargain collectively with labor unions with regard to an employer's supervisory employees. The Board has recently been criticized by this Court for its treatment of supervisory status in the health care field. See *N.L.R.B. v. Health Care & Retirement Corp.*, 511 U.S. 571

(1994). Here, the Board ignores the plain meaning of the Act, and again misapplies the specific phrase "in the interest of the employer" in interpreting and applying part of Section 2(11) of the Act.

The questions presented by Petitioner challenge the entire holding of the Board, which found that the dentists in question lacked supervisory authority. The Board based its holding on two grounds, both of which are erroneous and both of which violate the clear meaning of the Section 2(11) of the Act and the long standing national policy enacted by Congress regarding supervisors. The two theories upon which the Board based its decision may be summarized as: (1) the compatibility theory, and; (2) the infrequency of exercise theory.

The Compatibility Theory

The Board reverts to its error in *NLRB v. Health Care, supra,* in attempting to equate the transfer rights of dental assistants in this case with the transfer rights of dentists. Dental assistants have the right to request transfer to another dentist for compatibility reasons which are based on their own self-interests and not in the interests of the employer, Dr. Greenspan. The Board agrees that dental assistants have no right to request or cause the transfer of a dentist. Dentists, however, have the right to effectively recommend the transfer of dental assistants, not for personal compatibility reasons, or in their own self-interest, but in the interests of their employer for what amounts to disciplinary reasons. The Board does not deny that the record below shows that dentists cause the transfer of dental assistants. The record below demonstrates several reasons given by dentists for recommending the transfer of dental assistants:

1. ". . . unprofessional and lackadaisical performance." (A-15)
2. ". . . she did not pay attention to what Dr. Mello was doing and was not properly assisting her." (A-15)
3. "She was not performing her job properly...." (A-16)

4. "I can no longer work with her. She is not helping me." (A-16)
5. ". . . she went back to her old ways [of not performing her work properly]." (A-16)
6. "She was not attentive." (A-16)
7. ". . . rude and did not show him the proper respect." (A-18)
8. ". . . spent too much time on personal telephone calls." (A-18)

These reasons are clearly not indicative of incompatibility, but smack of disciplinary motivation.

The Administrative Law Judge found (A-15) that the most frequent form of discipline at the facility was the transfer of dental assistants from one dentist to the other, or from one dentist to another position at the facility (A-15). The Board, thus, clearly erred in what it refers to as its "principal holding" (Brief in Opposition, at 5), that the dentists' transfer rights are similar to the dental assistants' transfer rights and are, therefore, insufficient to confer supervisory status for the purpose of Section 2(11). The Board continues its errant policy, exhibited in *Health Care*, *supra*, by failing to find that the existence and exercise of transfer rights by the dentists, is essentially disciplinary and is done in the interests of the employer, rather than for compatibility purposes, in the self-interest of the dentists.

It is basic labor law policy that an employer is not required to recognize and bargain collectively with a labor organization for its supervisory employees. Unless this Court corrects the Board's misapplication of Congressional labor policy, the Board will continue to thwart the policy objectives of Congress.

Infrequency of Exercise

As an alternative ground for holding that the dentists are not to be considered supervisors, the Board agreed with the Administrative Law Judge's conclusion that the dentists' authority to recommend transfer is exercised too infrequently

to establish supervisory status (A-3, 25). This holding violates the clear meaning of Section 2(11). Congress has not qualified Section 2(11) by requiring that any of the twelve indicia of supervisory status contained therein be exercised *at all* in order for supervisory status to be found. Rather, it is the *existence* of the authority to effectively recommend transfer, rather than its actual exercise, or the frequency of its exercise, that determines supervisory status. The Board agrees (Brief in Opposition at 6), that the existence of the authority to effectively recommend transfer is the critical fact but then proceeds to attempt to modify the principle by distinguishing between specific delegation of authority and "*de facto* supervisory authority", a distinction not enacted by Congress and one, which, if accepted, modifies the plain meaning of the Act. Furthermore, the Board's attempted distinction conflicts with the record below which demonstrates that the dentists did, in fact, exercise their authority, and the recognition by the Administrative Law Judge that the transfer of dental assistants by dentists was the most common form of discipline at the facility.

The Board is attempting to change the national labor policy enacted by Congress. Congress has not required that supervisory authority be exercised any specific number of times, or at all, for a finding of supervisory status to be made. Unless the Court grants the Petition, the Board will continue to violate the Act and the national labor policy intended by Congress.

Conclusion

The decision below cannot be squared with the National Labor Relations Act. Due to the enormous significance of the issues presented, this Court should grant the Petition for Certiorari.

Dated: New York, New York
August 28, 1996

Respectfully submitted,

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